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39381—34——1

# In the Supreme Court of the United States

OCTOBER TERM, 1933

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No. —

UREY WOODSON, AS ALIEN PROPERTY CUSTODIAN of the United States, and W. A. Julian, as Treasurer of the United States, petitioners

*v.*

DEUTSCHE GOLD UND SILBER SCHEIDEANSTALT Vormals Roessler, a Corporation, Frankfurt a/Main, Germany

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Urey Woodson, Alien Property Custodian, and W. A. Julian, Treasurer of the United States, prays that a writ of certiorari issue to review the decree of the Court of Appeals of the District of Columbia, entered in the above case on November 20, 1933, affirming a decree of the Supreme Court of the District of Columbia, denying the petitioners' motion to dismiss the bill of complaint.

### OPINIONS BELOW

The Supreme Court of the District of Columbia rendered no opinion. The opinion of the Court of Appeals is not officially reported but may be found

in the Washington Law Reporter, Volume LXI, p. 896.

## JURISDICTION.

The decree of the court below was entered November 20, 1933. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the Alien Property Custodian had authority under the applicable statutes to deduct from the property of enemy aliens, seized by him pursuant to the Trading with the Enemy Act, certain percentages for the purpose of paying the overhead or administrative expenses of his office.

## STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, p. 15.

## STATEMENT

The respondent brought a bill in equity against the petitioners' predecessors in office in the Supreme Court of the District of Columbia under the Trading with the Enemy Act and the several amendments thereto. The bill of complaint (R. 1–8), as amended (R. 9–13), alleged substantially the following facts:

The respondent is a corporation organized and existing under the laws of Germany. (R. 1.) At the time of the entry of the United States into the late war the respondent owned certain property in the United States, including a large number of shares

of stock of three American corporations. (R. 2.) At that time also Holzverkohlungs Industrie Aktiengesellschaft, likewise a German corporation, owned certain property in this country, including shares of stock in an American corporation. (R. 2.) Pursuant to the provisions of the Trading with the Enemy Act, the Alien Property Custodian seized on the books of the various domestic corporations all of the right, title and interest of the respondent and Holzverkohlungs Industrie Aktiengesellschaft in and to the stock mentioned above, as well as other property, and since the date of such seizure has managed and administered the property so seized, together with the proceeds and earnings thereof and additions and accretions thereto, under the provisions of the Trading with the Enemy Act as from time to time amended. (R. 2.)

On or about July 16, 1930, Holzverkohlungs Industrie Aktiengesellschaft was, pursuant to the provisions of German law, merged with the respondent, and following such merger all property held by the Alien Property Custodian in the name of Holzverkohlungs Industrie Aktiengesellschaft was duly transferred on the Custodian's books to the account of the respondent. (R. 2.)

Subsequent to the enactment of the Winslow Act of March 4, 1923, each corporation filed a notice of claim with the Alien Property Custodian and obtained the release of $10,000 principal and income on the remaining property at not exceeding $10,000 per annum. (R. 9.)

After the enactment of the Settlement of War Claims Act of March 10, 1928, the two corporations likewise filed claims under that Act and received 80 percent of the property still held by the Custodian less amounts reserved for income taxes tentatively determined and certain other deductions hereinafter mentioned. (R. 3.)

Prior to the allowance of the claims under the Winslow Act, the Alien Property Custodian had deducted from the property of the two corporations certain amounts to cover fees, costs and commissions alleged to be due to depositaries or other persons for the costs and expenses of collecting, securing and safeguarding the property of the two claimants. (R. 9.) These sums are not involved in the present suit. (R. 9.)

Whenever the Alien Property Custodian released principal or income to either of the corporations under the Winslow Act, he deducted from the money to be released an amount equal to 1 percent on claims allowed and paid during the years 1924 to 1927, inclusive, and 2 percent on claims allowed and paid in 1928. (R. 9, 10.) The amount so withheld aggregated $1,400. (R. 10.)

Whenever the Custodian released any property under the Settlement of War Claims Act, he withheld an amount equal to 2 percent of the sums thus released. (R. 10.) These amounts, which were deducted at various times during the years 1929 to 1931, inclusive, aggregated $60,346.52. (R. 10.) The Custodian also, when crediting the aliens with

interest earned on moneys deposited in the Treasury, deducted 1 percent in respect of interest so earned during the years 1923 to 1927, inclusive, and 2 percent in respect of interest earned in later years. (R. 11.) These amounts aggregated $8,142.31. (R. 11.)

The amounts deducted from principal and income released under the Winslow Act and the Settlement of War Claims Act represented charges for administrative expenses and were deposited by the Custodian either in a special account maintained at the Commercial National Bank of Washington, D.C., or in a special account maintained in the United States Treasury for the credit of the Alien Property Custodian. (R. 12.) Out of said funds the Custodian has at various times withdrawn and is continuing to withdraw money for paying the administrative expenses of his own office and for paying to American, neutral and allied nationals sums due them under the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379.[1] (R. 4, 5.) The deductions from Treasury interest have not, to the respondent's knowledge, been given any designation except possibly that of "commission." (R. 12.)

The aggregate of the funds on deposit in the special accounts in the Commercial National Bank and the Treasury was, on December 31, 1930, $4,143,573.27. (R. 5.) This balance is less than

[1] It was held in that case that the Custodian was not entitled to make deductions for administrative expenses from property seized in the mistaken belief that it was the property of enemy aliens, but which in fact belonged to non-enemies.

the aggregate of the amounts deducted and withheld by the Custodian upon the property of all claimants whose claims have been allowed and is insufficient to pay in full all claimants, including the respondent, whose money has been paid into said accounts. (R. 5.) The petitioners do not have available any other funds which could lawfully be used to make up the deficiency in the event it should ultimately be held that the deduction of administration expenses was unauthorized and that the several claimants are entitled to have the money refunded. (R. 5.)

The Alien Property Custodian has not furnished any statement to the respondent showing what, if any, portion of the amounts thus withheld was necessary for securing, protecting or administering the property of the respondent and Holzverkohlungs Industrie Aktiengesellschaft, respectively, and what were the number of hours of work spent by and the rate of compensation paid to those employees of the Custodian who performed any such necessary services. (R. 6, 12.) The Custodian has kept no records showing what portion of said amounts withheld is properly allocable to the expense of administering the property of the two claimants. (R. 6–7, 12.)

The respondent asked that the petitioners be required to account for all sums withheld on account of administrative expenses and to refund $69,888.83 or such greater amount as might be found due. (R. 12.) It also asked the court to declare the existence of a lien in its favor on the special accounts men-

tioned above, to enjoin the petitioners from making payments out of said funds to anyone but the respondent, and, if deemed advisable, to appoint a receiver to take charge of the funds. (R. 8, 13.)

The petitioners filed an answer to the amended bill of complaint and also moved that the bill be dismissed as insufficient in law. (R. 14–26.) The Supreme Court of the District of Columbia overruled said motion without prejudice (R. 101), and a special appeal was taken to the Court of Appeals, which affirmed the decree of the lower court.

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Alien Property Custodian was without authority to deduct and withhold from the property held by him in the name of the respondent and Holzverkohlungs Industrie Aktiengesellschaft amounts computed on a percentage basis as a charge for the expense of administering such property.

2. In holding that the Alien Property Custodian had authority to deduct and withhold from the property held by him as aforesaid only the actual cost or expense incurred in administering said property.

3. In holding that the Alien Property Custodian must account to the respondent in detail for the expense of administering said property, showing what part of the amounts deducted and withheld represented the cost of such administration.

4. In holding that the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379, requires the conclusion that the Alien Property Custodian was without authority to make deductions on a percentage basis as aforesaid in respect of property owned by enemy aliens at the time of seizure.

5. In affirming the decree of the Supreme Court of the District of Columbia, denying the motion to dismiss the bill of complaint.

**REASONS FOR GRANTING THE WRIT**

1. The court below held that the Alien Property Custodian was without authority under the applicable statutes to deduct from property in his hands a charge computed on a flat percentage basis for the overhead or administrative expenses of his office. The question thus decided is one of substance relating to the construction of statutes of the United States which has not been, but should be, settled by this Court.

Prior to the enactment of the Winslow Act (Act of March 4, 1923, c. 285, 42 Stat. 1511) the Alien Property Custodian had, pursuant to orders promulgated by the President under authority conferred upon him by the Trading with the Enemy Act (Sections 5(a) and 12, Act of October 6, 1917, c. 106, 40 Stat. 411, 415, 423; Executive Orders of February 26, 1918, No. 2813, and July 16, 1918, No. 2916), charged against property held by him disbursements actually made to depositaries and the like in respect of such property (R. 9; see, also, Report of the Alien Property Custodian, Senate Document No. 181,

67th Congress, 2d Session, p. vi), but had not allocated any portion of such property to payment of the administrative expenses of his office. Section 2 of the Winslow Act, *supra*, which was the first statute providing for the return of sequestered enemy property, amended the Trading with the Enemy Act by adding thereto Section 24 (*infra*, p. 15), authorizing the Custodian to pay the necessary expenses incurred in administering the property held, "out of the money or other property * * * in respect of which such expenses are incurred, or * * * out of any other money or property held for the same person."[2]

Following the enactment of the Winslow Act, the Custodian adopted the practice of withholding from principal and interest paid out under that Act a small percentage by way of contribution towards the expenses of his office. (R. 10.) Congress was ad-

[2] The Treaty of Peace between the United States and Germany which was proclaimed November 14, 1921 (42 Stat., Pt. 2, 1939), incorporated by reference Part X of the Treaty of Versailles, whereby every action taken or to be taken with regard to sequestered property, including payment of charges and expenses in respect thereto, was ratified and confirmed, and it was further agreed that no German national should bring any action in respect of any act or omission under "the exceptional war measures, laws or regulations of any Allied or Associated Power" (Art. 298). Notwithstanding this agreement, Congress provided by the Winslow Act, *supra*, for the return of the corpus of sequestered property up to $10,000 and payment of income not exceeding $10,000 per annum. (See H.Rep. No. 1565, 67th Cong., 4th Sess.) The Settlement of War Claims Act authorized the return of 80% of the remaining principal and accrued income. Act of March 10, 1928, c. 167, 45 Stat. 254.

vised of this practice and of the exact percentages which were being deducted at various times, and was further informed that beginning February 1, 1928, all expenses of the Custodian's office had been paid in this manner. See Annual Reports of the Alien Property Custodian for 1925 (Sen. Doc. No. 94, 69th Cong., 1st Sess., p. 10) and 1927 (H.Doc. No. 302, 70th Cong., 1st Sess., *infra*, p. 16).

With this information before it, Congress enacted the Independent Offices Appropriation Act for the fiscal year 1929 (Act of May 16, 1928, c. 580, 45 Stat. 573, 574) which contained no appropriation for the expenses of the Alien Property Custodian, but provided that:

> All expenses of the office of the Alien Property Custodian * * * including compensation of the Alien Property Custodian at not to exceed $10,000 per annum; shall be paid from interest and collections on trust funds and other properties under the control of such Custodian.

At the hearings relative to this appropriation bill, the Custodian explained in detail the method by which the expenses of his office were being paid, and stated that beginning with November 1, 1927, he had succeeded in making the office self-sustaining by deducting 2 percent in lieu of the 1 percent which had theretofore been charged. See transcript of Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives relative to the Independent Offices Appropriation Bill,

1929, 70th Cong., 1st Sess., December 13, 1927, pp. 3, 7–8, 10–11, 13–14. This information was incorporated in the Report of the Appropriations Committee (H.Rep. No. 293, 70th Cong., 1st Sess., *infra*, p. 16), which stated that the office had become self-supporting by reason of charges made "under the terms of the Winslow Act" and recommended the adoption of the provision eventually enacted. The prevailing practice in respect of administrative charges was also explained on the floor of the House, express mention being made of the rates in effect at various times. See Appendix B, *infra*, pp. 17–18.

There is no doubt, therefore, that Congress was fully advised of the practice when it enacted the Independent Offices Appropriation Act, *supra*, and it is plainly to be inferred that it considered that practice to be in accord with Section 24 of the Trading with the Enemy Act, *supra*. In any event, the enactment of the Appropriation Act must, we submit, be regarded as a ratification of the deductions made prior thereto and as express authority for deductions to be made therafter. Congress was under no legal obligation to return any of the property seized and could authorize or ratify any disposition of such property or any part thereof, as it might see fit. See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11. The question presented is, therefore, solely one of statutory construction, and we submit that the court below erred in holding that the deductions were unauthorized.

2. The court below erred, we submit, in holding that the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379, compelled the conclusion which it reached. That case involved the property of a neutral which had been seized in the mistaken belief that it belonged to an enemy alien. The Court held that the Custodian was not entitled to charge expenses of administration against property which the law did not intend that he should seize. Concededly, the opinion contains language tending to support the decision below. That language, however, was not necessary to the disposition of the case, and in view of the legislative history to which we have referred, some of which has not previously been called to the attention of this Court, and of the fact that the seizure of the respondent's property was undoubtedly rightful, we feel justified in contending that the *Escher* case should not be regarded as controlling here.

3. The question presented is of considerable importance in the administration of the office of the Alien Property Custodian. The Custodian has not maintained an accounting system which would enable him to determine the cost of administering each individual trust under his control. Consequently, if the decision below stands, the respondent and others similarly situated will presumably be held entitled to recover the full amounts claimed. This will necessitate the appropriation by Congress of large sums of money to satisfy the claims and to pay future expenses of the Custodian's office, although Congress

clearly intends that the office shall be self-supporting and has made no appropriations for its operation since 1928. There are now pending in court fourteen cases involving the question here presented, and it is highly desirable that the matter be settled.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
*Solicitor General.*

FEBRUARY, 1934.

# APPENDIX A

## STATUTES

Section 24 of the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, added thereto by Section 2 of the Winslow Act of March 4, 1923, c. 285, 42 Stat. 1511, 1516, provides:

> SEC. 24. The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

The Independent Offices Appropriation Act of May 16, 1928, c. 580, 45 Stat. 573, 574, provides in part:

> ALIEN PROPERTY CUSTODIAN
>
> All expenses of the office of the Alien Property Custodian authorized by the Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended, including compensation of the Alien Property Custodian at not to exceed $10,000 per annum; shall be paid from interest and collections on trust funds and other properties under the control of such Custodian.

## APPENDIX B

The Annual Report of the Alien Property Custodian for 1927 (H.Doc. No. 302, 70th Cong., 1st Sess., p. 2) contains the following statement:

> Beginning November 1, I instituted an important change in the method of paying the expenses of the office. All the salaries except the custodian's salary from November 1 to December 31, 1927, were paid from the funds in my custody through the retention of a small percentage on the funds handled, as will appear in detail in one of the following tables. By reason of this change a total of $67,634.71 has been turned back into the Treasury as unexpended from appropriations previously made. Since February 1, 1928, all expenses of every kind and character in connection with administering the funds and property in my custody have been paid from the funds being handled.

On page 7 of the same report there appears a table showing the rates of commissions taken at various times from July 1, 1926, to December 31, 1927, in connection with the administration of alien property.

The Report of the Appropriations Committee of the House of Representatives relative to the Independent Offices Appropriation Bill, 1929 (H.Rep. No. 293, 70th Cong., 1st Sess., p. 2), contains the following statement in reference to the expenses of operation of the office of the Alien Property Custodian:

ALIEN PROPERTY CUSTODIAN

> For the office of the Alien Property Custodian the committee recommends a change in the language of the paragraph providing for

the expenses of this activity. Under the terms of the Winslow Act, the Alien Property Custodian is authorized and directed to make certain charges in the handling of trust funds and other properties, and as a consequence the cost of the work of this establishment has become self-sustaining. The language recommended by the committee is as follows:

> All expenses of the office of the Alien Property Custodian authorized by the act entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended, including compensation of the Alien Property Custodian at not to exceed $10,000 per annum, shall be paid from interest and collections on trust funds and other properties under the control of such custodian.

The provisions of the above paragraph limit the maximum compensation of the Alien Property Custodian to $10,000 per annum, which heretofore has been at the rate of $7,500 per annum.

During the course of the debate on the floor of the House relative to the Independent Offices Appropriation Act, 1929, the following statements were made by Mr. Vinson, a member of the Committee on Appropriations, and Mr. Wood, Chairman of the same Committee (Congressional Record, 70th Cong., 1st Sess., Vol. 69, Pt. 2, pp. 1745, 1799):

Mr. VINSON:

* * * * *

> According to the record presented to us, this office, beginning with November 1, was made self-sustaining, which is explanatory of the decrease in the appropriation requested from that which was carried for the current fiscal year. That amount was $98,000. This is

made possible by a change in the charges against the property and income in possession of this office. Heretofore the charge has been 1 per cent on income and one-fourth of 1 per cent on principal cash. Under the new plan the charge would be 2 per cent on income; nothing on receipts of principal, but 2 per cent on principal paid out. With this charge written off, Senator Sutherland states that the property will net an interest earning of 3½ per cent or more at the time of its return.

* * * * *

Mr. WOOD:

* * * * *

I wish to say in passing that the present officer in charge of alien property has carried out to the letter the provisions of the Winslow Act in making the office of the Alien Property Custodian self-supporting. A reference to the hearings in this matter will show that the office of the Alien Property Custodian has been conducted at far less expense, in proportion to the amount of assets on hand and the responsibilities involved, than at any time heretofore.

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